IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 184 OF 2004

Abdul Rehman Kasamali Mulla. ... Appellant.

Versus.

Mohammed Sadik Abdul Saheb Jakaler
and another. ... Respondents.

Shri K.Y.Mandlik for the Appellant.

Shri S.A.Sawant for the Respondent No.1.

CORAM : ABHAY S. OKA, J.

DATED : 31st March, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Second Appeal is preferred by the original Defendant No.2. The suit filed by the Respondent No.1 is for specific performance of an agreement to sell executed by the Respondent No.2 in his favour on 17th January 1992. The Appellant is the real brother of the Respondent No.2. The case of the Appellant is that on 14th August 1991 the Respondent No.2 executed an agreement in his favour for sale of the suit property. During the pendency of the suit i.e. on 14th May 1993 the Respondent No.2 executed a sale deed in favour of the Appellant. The trial Court passed a decree directing the Respondent No.2 and the Appellant to execute sale deed in favour of the Respondent No.1. The said decree was challenged by the Appellant by preferring an appeal to the District Court. The said Appeal has been

dismissed. Therefore, the present Second Appeal.

2. Shri Mandlik on behalf of the Appellant submitted that the Respondent No.1 has entered into the transaction with the Respondent No.2 with the full knowledge of the sale transaction between the Respondent No.2 and the Appellant. He placed reliance on various letters allegedly sent by the Appellant to the Respondent No.1. He submitted that the agreement executed in favour of the Appellant was prior in point of time. He further submitted that though the sale deed executed in favour of the Appellant is dated 14th May 1993 the Application for amendment was made on 29th August 1994 by the Respondent No.1 for impleading the Appellant as party and ultimately the Appellant was impleaded as a party in the year 1996. He, therefore, submitted that the suit was barred by limitation in so far as the Appellant is concerned. He pointed out that the decree for specific performance has been passed against the Appellant though suit against him will have to be taken as instituted in the year 1996.

3. I have considered the submissions of Shri Mandlik. The Courts below and especially the Appellate Court has disbelieved the case made out by the Appellant that the agreement for sale was executed in favour of the Appellant by the Respondent No.2 prior to the execution of the suit agreement. Various reasons are assigned by

the Appellate Court for coming to the said conclusion. The Appellant has placed reliance on the letter dated 30th September 1991 sent by him to the Respondent No.1. In the said letter though there is a reference to the sale transaction between the Appellant and the Respondent No.2, the date of the agreement is not mentioned. The date of the suit agreement in favour of the Respondent No.1 is 17th January 1992. Surprisingly in the letter dated 30th September 1991 the Appellant has referred to the proposed transaction between the Respondent No.2 and the Respondent No.1. The Appellate Court also found that in the letter dated 1st June 1992 sent by the Appellant to the Advocate for Respondent No.1 by way of a reply to a public notice published by the Respondent No.1 the date of the agreement between the Appellant and the Respondent No.2 is not mentioned. Similarly in the letter dated 24th February 1992 sent by the Appellant to the Respondent No.1 the date of the alleged agreement between the Appellant and the Respondent No.2 is not specified. The Appellate Court has noted that even in the Written Statement filed by the Respondent No.2, there is no reference to the date of the agreement between the Appellant and the Respondent No.2. These are some of the factors which are considered by the Appellate Court for coming to the conclusion that it was very difficult to believe that the agreement between the Appellant and the Respondent No.2 was in existence prior to the suit agreement. As

noted earlier the Appellant and the Respondent No.2 are brothers. The finding recorded by the Appellate Court is based on the consideration of documentary and oral evidence on record and there is no perversity.

4. The sale deed executed by the Respondent No.2 in favour of the Appellant is dated 14th May 1993. It is pertinent to note that on 29th August 1994 an application for amendment was made by the Respondent No.1. In the said amendment application, a prayer was made for impleading the Appellant as a party. By the said application for amendment a contention was raised that the transaction between the Appellant and the Respondent No.2 is illegal. A prayer was added by the said Application for amendment that the sale deed is not binding on the Respondent No.1. Assuming that it was necessary for the Respondent No.1 to challenge the sale deed, the application for amendment is made after one year after the execution of the sale deed. The date of passing of the order on the said application may not be of any consequence as the amendment which is permitted will relate back to atleast to the date on which the Application for amendment was made. The sale deed is executed by the Respondent No.2 in favour of the Appellant during the pendency of the suit for specific performance filed by the Respondent No.1.

5. It is necessary to refer to section 19 of the

Specific Relief Act 1963. Considering clause (b) of section 19, a decree for specific performance of a contract can be passed against the party to the contract and also against any other person claiming under a party to the contract by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice to the original contract. There is a finding of fact recorded against the Appellant that he has failed to establish that the agreement executed by the Respondent No.2 in his favour is prior to the date of the suit agreement. The sale deed executed in favour of the Appellant is during the pendency of the suit filed by the Respondent No.1 and is subsequent to the suit agreement. There is nothing on record to show that the Appellant was a bonafide purchaser. In fact in one of the letters i.e. letter dated 30th September 1991, the Appellant has disclosed his knowledge regarding the transaction which was in contemplation between the Respondent No.1 and the Respondent No.2. This by virtue of clause (b) of section 19 of the Specific Relief Act 1963, the Court was empowered to pass a decree against the Appellant who was claiming under the Respondent No.2 on the basis of title arising subsequent to the suit agreement. As stated earlier bar of limitation will not be attracted as from the date of execution of the sale deed an Application for amendment was made by the Respondent No.1 within a period of 15 months.

6. There is no merit in the Second Appeal as no substantial question of law arises in the Second Appeal. The Second Appeal is accordingly dismissed with no order as to costs.

7. At this stage Shri Mandalik prayed that ad-interim relief granted by this Court may be continued for a period of 8 weeks. The said prayer is opposed by the learned Counsel for the Respondent No.1. Considering the fact that ad-interim relief was granted by this Court, the same relief will continue to operate for a period of 8 weeks from today.

8. Parties to act on an authenticated copy of the said order.

Judge.